

STATE OF MICHIGAN
COURT OF APPEALS

MID-WEST CARPENTRY, INC.,

Plaintiff-Appellee,

v

VMS BUILDERS, INC.,

Defendant-Appellant.

UNPUBLISHED

November 10, 2005

No. 254577

Ingham Circuit Court

LC No. 03-000831-CZ

Before: Gage, P.J., and Hoekstra, and Murray, JJ.

PER CURIAM.

Defendant appeals as of right the trial court order denying its motion to set aside default and default judgment. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was a sub-contractor who did work for defendant contractor. The work on that project was completed on March 5, 2003, and plaintiff filed a construction lien against the property on April 2, 2003 in the amount of \$27,886.00 for payment not received. On May 1, 2003, plaintiff filed its complaint in the instant action seeking \$27,886.00 plus interest, attorney fees, and costs. Defendant's business is located in Florida, and it did not file any documents in the trial court. By June 18, 2003, however, the parties had communicated with each other through Michigan counsel for plaintiff and Florida counsel for defendant, and an additional payment of \$21,133.96 was made to plaintiff. In consideration of that payment, plaintiff signed a full unconditional waiver, waiving all plaintiff's construction lien rights.

Following that payment and waiver there was apparently no communication between these two parties concerning this case.¹ In December 2003, however, plaintiff sent a letter to the trial court's alternative dispute resolution (ADR) clerk concerning a case evaluation. Shortly after defendant received a copy of that letter, communication resumed between the parties. On January 6, 2004, two letters were faxed between counsel. The letter from defendant's counsel stated that it believed the dispute between the parties had been resolved with the prior payment. That letter also requested additional information concerning damages that plaintiff was requesting. The January 6, 2004, correspondence from plaintiff's counsel stated that he was not

¹ There were additional defendants in the circuit court and other action in the case was taken during that time, but all those defendants are non-parties to this appeal. There was apparently no communication between these two parties or action in the trial court affecting this defendant.

authorized to dismiss the case due to damages caused by the delay in payment. Two days later, on January 8, 2004, plaintiff filed its request for entry of default. Default judgment was entered in the amount of \$14,063.48 on January 12, 2004.

The case evaluation was completed on January 9, 2004. Defendant rejected that evaluation on January 16, 2004 by a letter to the ADR clerk. Subsequently, defendant learned of the default judgment and filed a motion to set it aside. The trial court denied defendant's motion, finding that defendant had not appeared in the case and therefore was not entitled to notice prior to the entry of judgment. Additionally, the trial court did not find good cause to set aside the default judgment.

A trial court's decision to enter a default is reviewed for an abuse of discretion. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003). Interpretation of court rules is a question of law that is reviewed de novo. *Id.*

If a default judgment is sought against a party that has appeared in a case, then the "party seeking the default judgment must give notice of the request for judgment to the defaulted party." MCR 2.603(B)(1)(a). If a party has not appeared, however, then it is only entitled to notice of the actual entry of default and not the request for default. MCR 2.603(A)(2).

An attorney may appear in a case "by an act indicating that the attorney represents a party in the action." MCR 2.117(B). This Court has also found that communications between counsel for the purpose of settlement, attendance at a scheduling meeting, and an informal request for an extension of time to file an answer were sufficient to be deemed an appearance and therefore required notice prior to the entry of default. *Ragnone v Wirsing*, 141 Mich App 263, 265-266; 367 NW2d 369 (1985).

Ragnone did not specifically define what constitutes an appearance for default proceedings, but it provided guidelines. The term "appear" should be taken "in its generic sense" as any act acknowledging jurisdiction of the court or invoking court action on the party's behalf. *Ragnone, supra* at 265. To render an act sufficient to support the inference that it is an appearance, two requirements must be met: 1) knowledge of the pending proceedings, and 2) intent to appear. *Id.* Any action on a defendant's part, except an objection to jurisdiction over his person, will constitute a general appearance. *Id.* In the present case there is no question that defendant had knowledge of the pending proceedings. The dispositive question is whether defendant had the intent to appear. According to the definition of appear as stated in *Ragnone*, that intent to appear would be shown by an intent to acknowledge jurisdiction of a court or invoke court action on its behalf. *Id.*

The parties' actions in this case plainly meet the court rule and case law guidelines to find that defendant made an appearance for default proceedings. Defense counsel's actions showed that he represented defendant as required by MCR 2.117(B). Those actions include correspondence between counsel, including payment to plaintiff soon after the complaint was filed, and plaintiff's signing of an unconditional waiver of construction lien rights. Following that action there was apparently a lull of approximately six months by both parties regarding this case. Once defendant learned of plaintiff's continued involvement concerning case evaluation, it requested additional information concerning damages and also responded in a timely manner to the ADR clerk, thereby acknowledging the jurisdiction of the court.

The notice requirement of MCR 2.603(B) mandates that when a party has appeared in an action, the party seeking a default must give notice of the request for judgment to the other party. MCR 2.603(B). Because the notice requirements are mandatory and were not met, there was good cause to set aside the default under the requirements of MCR 2.603(D) due to procedural irregularities concerning notice. Therefore, the trial court abused its discretion in denying defendant's motion to set aside the default and default judgment. *ISB Sales Co, supra* at 526.

Given our resolution of defendant's first issue, we need not address its alternate grounds for setting aside the default judgment.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Hilda R. Gage

/s/ Joel P. Hoekstra

/s/ Christopher M. Murray